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No. 93-1033

IN THE

Supreme Court of the United States

October Term, 1993

DAVID RONALD CHANDLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION

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The Government recognizes that this case presents constitutional issues in common with *Simmons v. South Carolina*, No. 92-9059 (argued Jan. 18, 1994) but argues that certiorari should be denied on the other Questions Presented. Its arguments fall into two categories.

First, rather than defending the published opinion of the Eleventh Circuit, the Government argues that the Court of Appeals should not have addressed the merits of some of the issues it did, in fact, decide. For example, the Government virtually concedes that the Eleventh Circuit misconstrued the federal death-penalty statute in holding that it does not require a comparative judgment between death and lesser sentences (Br. 13-15), but argues that Mr. Chandler waived this issue in the

District Court. The Government's waiver argument is wrong,[1] but that is the least of its faults. What the Government is asking this Court to do is (1) to uphold Mr. Chandler's death sentence on fact-specific grounds unresolved by any court below and unaddressed on the merits by this Court, and (2) to let the Court of Appeals' legally incorrect statutory interpretation stand as the leading precedent governing vitally important aspects of the federal capital sentencing process. This is indefensible.

Second, the Government argues that the Eleventh Circuit's rulings regarding other significant aspects of federal capital sentencing procedure should not be reviewed on the merits because they are correct on the merits. Aside from their discussion of the fourth question, which misconstrues petitioner's argument,[2] the Government's elaborate substantive reasoning

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[1] While trial counsel originally agreed to modify the initially proposed instruction, as the Government correctly notes, this was to avoid misinforming the jury that it had the power to actually *recommend* an alternative sentence. The record is clear that trial counsel was only objecting to the confusing phraseology of that particular instruction and that he clearly wanted an instruction that *informed* the jury of the alternative sentence. (RXIV-57-58)

Later, as the Government recounts, the court did not give trial counsel the opportunity to object to the failure to give the proper instruction but, instead, granted defense counsel an objection extending, not only to any failures to give a proposed instruction, but also to any "appropriate ground" for objecting. (RXV-93-94) The Government made the same waiver argument below and neither District Court, which was in the best position to consider it, nor the Court of Appeals, accepted it. *See* Pet. App. A66-A69, A12-A14.

[2] Petitioner's attack on the 21 U.S.C. § 848(n)(1)(C) aggravating factor is not based, as the Government suggests, on the fact that this factor duplicates an element of the underlying homicide offense. (Br. 26) Rather, petitioner's claim is that § 848(n)(1) improperly designates, *as an "aggravating" factor weighing in favor of death*, the necessary threshold finding that the defendant meets the minimum intent requirements of the eighth amendment. *See Tison v. Arizona*, 481 U.S. 137 (1987). Since the (n)(1) intent/recklessness factors necessarily "appl[y] to every defendant eligible for the death penalty", they are constitutionally infirm. *Arave v. Creech*, ___ U.S. ___, 113 S. Ct. 1534, 1542 (1993). The presence of such an over-inclusive aggravating factor in a weighing statute such as § 848 invalidates the death penalty despite the relative narrowness of the underlying homicide offense, *Stringer v. Black*, ___ U.S. ___,

plainly demonstrates that the issues are complex and controversial. That is all the more reason why this Court should decide them after full briefing and oral argument.

For the reasons stated in Mr. Chandler's Petition, and not answered by the Government, certiorari should be granted on all points raised.

April 20, 1994

Respectfully submitted,
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112 S. Ct. 1130, 1138-39 (1992), and the issue warrants review by this Court.